Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ST. LOUIS SOUTH PARK, INC.,
d/b/a MERCY CONVALESCENT,
Petitioner,

vs.

MISSOURI DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MEDICAL SERVICES,
Respondents.

Petition for Writ of Certiorari to the
Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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Question Presented

I. Whether a Medicaid reimbursement plan which awards different inflation allowances to similarly situated nursing homes, based solely on the date their fiscal years end, complies with the equal protection clause of the Fourteenth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

Opinion Below

The Opinion of the Missouri Court of Appeals, Western District, is reported at 857 S.W.2d 304 (Mo. App. 1993).

Jurisdictional Grounds

The court of appeals issued its opinion on April 27, 1993. On May 12, 1993, Petitioner St. Louis South Park, Inc. d/b/a/ Mercy Convalescent (St. Louis South Park) filed a timely motion for rehearing or alternative application for transfer to the Missouri Supreme Court. On June 1, 1993, the court of appeals denied that motion.

On June 16, 1993, St. Louis South Park filed a timely application for transfer in the Missouri Supreme Court. On August 17, 1993, the Missouri Supreme Court denied that application. App. 31. This Petition is filed within ninety days of that date.

This Court has jurisdiction of this Petition pursuant to 28 U.S.C. § 1257(a), in that St. Louis South Park challenges a regulation of the State of Missouri, authorized by and implementing a state statute, on the ground that it is repugnant to the Fourteenth Amendment to the United States Constitution. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 258 (1934).

Constitutional Provisions At Issue

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

Statement Of The Case

St. Louis South Park is a skilled nursing facility, 92% of whose patients are Medicaid patients. This case concerns a state Medicaid regulation that:

A. Gave St. Louis South Park an inflation allowance for only four months of 1988; and

B. Gave 208 other nursing homes, similar to St. Louis South Park in all material respects, an inflation allowance for the full twelve months of 1988.

That discriminatory treatment costs St. Louis South Park more than $85,000 per year — money that could well be used to care for its frail, indigent residents. The sole reason for that discriminatory treatment is that St. Louis South Park has an April 30 fiscal year, instead of a year end fiscal year.

The regulation in question, promulgated by the Department of Social Services (the "Department"), became known as the "New Plan." The New Plan implemented a new method of calculating the per diem rates to be paid to nursing homes that participate in Missouri's Medicaid program.

In designing the New Plan, the Department was obliged to comply with federal statutes governing Medicaid. Under these statutes, payment rates for long term care facilities must take into account economic trends and conditions during the period for which rates are set. Senate Comm. on Finance, 96th Cong. 2d Sess., Spending Reductions: Recommendations of the Committee on Finance, *reprinted in* 126 Cong. Rec. S8256-57 (June 26, 1980). Moreover, federal law prohibits states from setting such rates solely on the basis of budgetary constraints. H. Conf. Rep. No. 1479, 96th Cong. 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 5903, 5944.

The New Plan first developed a starting point: the allowable daily costs incurred by a nursing home, as reflected in its "cost report" on file for its fiscal year 1988. The New Plan then added 11.1% to that figure to account for inflation. App. 24. The source of the 11.1% figure was a standard national measure of inflation.

The New Plan requires each nursing home to submit its cost report for the same time period that it uses for federal income taxes. St. Louis South Park's fiscal year ends on April 30. Thus, St. Louis South Park filed its 1988 cost report as of April 30, 1988. The costs reflected in that report were as of the same date.

Nursing homes with a year end fiscal year must file cost reports as of December 31. The costs reflected in the reports filed by those nursing homes will, of course, reflect the inflation experienced during those eight months.

As a result, nursing homes with year end fiscal years receive a full year's worth of 1988 inflation in computing the base rate

for the New Plan. By contrast, St. Louis South Park receives but four months' worth of inflation in computing its base rate. The New Plan therefore gives a greater inflation allowance to nursing homes with year end fiscal years than it does to St. Louis South Park. This discrimination is identical in principle to the scheme at issue in *Zobel v. Williams*, 457 U.S. 55 (1982) — in which this Court held that Alaska could not pay greater oil dividends to longer term residents of the state.

Both the Administrative Hearing Commission (AHC) and the circuit court found that the solution to this discrimination was simple: merely inflate St. Louis South Park's 1988 cost figures by applying the Department's standard inflation index to the eight months between April 30 and December 31, 1988. App. 15; 25. The sole issue is whether the Department has any rational reason for giving some nursing homes a full year's inflation allowance for 1988, while restricting others — like St. Louis South Park — to only four months' inflation allowance in 1988.

Preservation Of Constitutional Claim

Under Missouri law, the Missouri AHC has no jurisdiction to rule on constitutional claims. Persons or entities wishing to raise such claims must nonetheless initiate them before the AHC and make a factual record, on which the AHC can base factual findings. The plaintiff then files an action in the circuit court, the court of general jurisdiction in Missouri, to obtain a ruling on the constitutional issue.

St. Louis South Park filed a Complaint before the AHC, in which it alleged that the New Plan "denied Petitioner equal protection under the law in violation of . . . the Fourteenth Amendment to the United States Constitution. App. 40. The AHC observed that the issue before it was St. Louis South Park's complaint that:

> the Department's regulation invidiously discriminates against certain members of the same class created by the

> Department's ratemaking regulation in violation of . . . the Fourteenth Amendment to the United States Constitution.

App. 22. The AHC acknowledged St. Louis South Park's argument that providing a larger inflation allowance to nursing homes with year end fiscal years "is invidious discrimination within the class in violation of . . . the Fourteenth Amendment to the United States Constitution." App. 28. The AHC concluded, however, that it "cannot make conclusions of law on the issue of equal protection." App. 30.

St. Louis South Park filed a petition for judicial review in the Circuit Court of Cole County. The Petition recites that it presents:

> the constitutional issue of whether Defendants Missouri Department of Social Services and Division of Medical Services denied plaintiff its rights guaranteed under the Equal Protection Clause of the Constitutions of the United States (Fourteenth Amendment) and Missouri (Article I, Section 2), by treating it differently from other nursing homes in the same class of nursing homes . . . .

App. 34. The circuit court observed that the issue before it was whether the New Plan "violated Plaintiff's rights guaranteed under the Equal Protection clause of the Missouri and United States Constitutions. App. 8. The circuit court found that it did "by using an arbitrarily chosen date upon which to base the distribution of government benefits." App. 21.

The Missouri Court of Appeals, Western District, reversed. While the opinion does not mention the Fourteenth Amendment, it does refer several times to the concept of equal protection. App. 1;3-4. In light of the circuit court's holding, the court of appeals necessarily had to pass on the Fourteenth Amendment issue in order to reverse.

Reasons Why The Writ Should Be Granted

Missouri courts have historically been reluctant to follow this Court's holdings in the area of equal protection. *E.g.*, *Millsap v. Quinn*, 757 S.W.2d 591 (Mo. banc 1988), *rev'd*, 491 U.S. 95 (1989) (refusing to apply equal protection clause to unit of government not exercising general governmental powers); *Hadley v. Junior College District of Metropolitan Kansas City*, 432 S.W.2d 328 (Mo. banc 1968), *rev'd*, 397 U.S. 50 (1970) (same); *Wengler v. Druggists Mutual Ins. Co.*, 583 S.W.2d 162 (Mo. banc 1979), *rev'd*, 446 U.S. 142 (1980) (upholding gender preference). The concurring opinion in the last case announced that there was no supreme law of the land with respect to gender based equal protection claims. 583 S.W.2d at 168 (Donnelly, J., concurring).

The instant case continues Missouri's practice of ignoring this Court's precedents. While the rational basis standard is a lenient one, it still requires courts to explain why an unequal classification has some logical relationship to some legitimate public interest. The opinion below offers no such explanation. As a result, it effectively repeals rational basis review of equal protection claims in social welfare programs. The justifications relied upon would support every conceivable classification a state might make, no matter how arbitrary. To achieve that result, the opinion below ignores numerous holdings of this Court, of the federal appellate courts, and of other state supreme courts.

I. The Objective Of Controlling Costs, Standing Alone, Does Not Justify An Otherwise Arbitrary Classification.

The opinion below first justifies the New Plan's arbitrary classification based on "the state's interest in controlling costs." App. 5. The opinion does not explain why that objective is rationally related to the classification. Every arbitrary classification in a social welfare program will "save money," because

the disfavored class receives less than it fairly should. Thus, the opinion below effectively repeals rational basis review.

This Court has squarely held that a "concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982). *Accord, Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). The opinion below also contradicts the Third Circuit's holding that, in attempting to control costs, the states must "proceed in a manner which achieves that goal while fairly treating similarly situated persons." *Medora v. Colautti*, 602 F.2d 1149, 1153 n.9 (3d Cir. 1979). The opinion below also flatly contradicts two recent holdings of the Kansas Supreme Court. *Stephenson v. Sugar Creek Packing*, 830 P.2d 41, 49 (Kan. 1992) (state may not pursue the "objective of saving money by discriminating against individuals or groups"); *Thompson v. KFB Insurance Co.*, 850 P.2d 773, 782 (Kan. 1993) (no rational relationship between cost-cutting and arbitrary classification).

II. Administrative Convenience Does Not Justify An Arbitrary Classification When An Equally Simple Rule Would Avoid It.

The opinion below next justifies the arbitrary classification on the ground of the State's interest in "simplify[ing] accounting procedures" by relying on "established" cost reports. App. 5-6. Once again, the opinion did not explain why that objective is rationally related to the classification. A creative bureaucrat can "justify" virtually any classification on the ground that it will save him or her some time or effort. Thus, the opinion below effectively repeals rational basis review.

This Court has squarely held that arbitrary classifications may not "be justified on the ground of administrative convenience," when any such alleged inconvenience would be "minimal." *Rinaldi, supra*, 384 U.S. at 309. The opinion below also ignores

the Third Circuit's holding in *Medora*, 602 F.2d at 1153 n.9 ("administrative convenience, alone, cannot justify denying benefits to a class of applicants who are otherwise qualified to receive them"), and the Eighth Circuit's holding in *Ranschburg v. Toan*, 709 F.2d 1207, 1212 (8th Cir. 1983) ("classification is not rationally related to the *alleged* state interest in administrative convenience" when fair alternatives are "readily available") (emphasis original).

The opinion does make a half-hearted suggestion that the cure for the constitutional violation would involve "additional accounting" to determine "actual inflation" experienced by each nursing home. App. 6. That argument ignores the actual relief sought by St. Louis South Park and awarded by the circuit court. The Department decided to use a general index to determine a statistically average amount of inflation. The circuit court merely ordered the Department to use the *exact same* statistical average to give St. Louis South Park the eight months' worth of inflation in 1988 that nursing homes with year end fiscal years received. A sixth-grader could follow that methodology. Both the AHC and the circuit court found that this adjustment would "properly account" for the inflation that St. Louis South Park experienced. App. 15;25. The administrative "burden" associated with curing the arbitrary classification is minimal.

III. The Classification Is Not Self-Justifying.

The opinion finally attempts to justify the arbitrary classification on the ground that the state has an interest in "treating the participating nursing homes similarly for a twelve month period based upon their fiscal year end cost reports." App. 6. The use of "a twelve month period based on . . . fiscal year end cost reports" ***is*** the classification to which St. Louis South Park objects. The opinion below holds that the classification justifies itself — a proposition that, once again, repeals rational basis scrutiny in every social welfare program.

This Court has squarely held that a state "must do more than justify its classification with a concise expression of an intent to discriminate." *Plyler, supra*, 457 U.S. at 227. *Accord, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring). The opinion below ignores these holdings, as well the numerous holdings of the federal courts of appeals and state supreme courts to the same effect. *E.g., Ranschburg, supra*, 709 F.2d at 1211 (if the purpose is a "restatement of the classification" the rational basis test would be "no standard at all"); *Thompson, supra*, 850 P.2d at 779-80 (It is not enough to say that the legislature achieved what it set out to do").

Conclusion

The equal protection clause ought to mean the same thing in a Missouri courtroom as it does in a federal courtroom. If it does not, future litigants will not seek to redress their federal claims in Missouri courts. That is not a healthy result in a federal system.

For these reasons, St. Louis South Park respectfully prays that the Court grant its Petition for Certiorari to the Missouri Court of Appeals for the Western District.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 46944

ST. LOUIS SOUTH PARK, INC.,
d/b/a MERCY CONVALESCENT,
Respondent,

vs.

MISSOURI DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MEDICAL SERVICES,
Appellant.

OPINION FILED: April 27, 1993

APPEAL FROM THE CIRCUIT COURT OF COLE
COUNTY, MISSOURI
The Honorable Byron Kinder, Judge

BEFORE FENNER, P.J., ULRICH and SMART, JJ.

Appellant, Missouri Department of Social Services, Division of Medical Services (the Department), appeals the decision of the circuit court which held that the Department's regulation implementing a new method of calculating the per diem rates to be paid nursing homes (the New Plan) violated equal protection. Respondent, St. Louis South Park, Inc., d/b/a Mercy Convalescent Center (Mercy), is a licensed nursing facility certified to participate in the Missouri Medicaid Program. Mercy successfully argued to the trial court that the New Plan denied it equal protection under the law.

THE NEW PLAN

On June 18, 1990, the Department published an emergency regulation in the Missouri Register, 13 CSR 70-10.010, effective

July 1, 1990, known here as the New Plan. The New Plan set per diem rates for nursing homes participating in the Medicaid program. The 1988 cost report of each participating facility was used as the basis for determining the allowable per diem rate for a given facility.

Each participating facility's 1988 cost report covered a twelve month period based upon the facility's fiscal year ending in 1988. In 1988 there were 376 nursing homes participating in the Medicaid program. Of the total homes, 208, or 55%, had fiscal years ending December 31st. Mercy's fiscal year ended April 30th and it was one of only 5% of the participating homes which had a fiscal year ending April 30th or before.

The criteria for allowable costs as established by the Department are set forth in 13 CSR 70-10.010. The participating facilities' 1988 cost report was used as a basis for establishing allowable costs because that was the most recent year that the Department had received and desk reviewed cost reports from all of the Medicaid participant nursing homes.[1]

Upon review of the facility's 1988 cost report, a base figure for allowable cost was determined. The base figure was multiplied by 111.1% (i.e. increased by 11.1%) and then $1.06 was added as a minimum wage adjustment. The greater of the rate determined by this calculation or the facility's rate in effect on June 30, 1990 became the facility's per diem rate effective for services provided on and after July 1, 1990. The Department then allowed another $.50 to reflect a laundry allowance, $.47 was added as a trend factor[2], and $1.00 was added as a consultant

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[1] A desk review is defined under 13 CSR 70-10.010(4)(G) as the Division of Medical Services' review of a provider's cost report without on site audit.

[2] The $.47 trend factor is 1% of the average rate of all Medicaid facilities on April 30, 1990.

adjustment. The result of these calculations became the facility's rebased rate effective July 1, 1990, subject to a ceiling of $54.95.[3]

The 11.1% adjustment was determined by multiplying 3.7% per year for a three year period (July 1, 1988 to June 30, 1991). The 3.7% represents the average of eight quarters of Gross National Product Implicit Price Deflator. The Administrative Hearing Commission (Commission) found that the 11.1% increase was an inflation factor, but recognized that the Department presented evidence that the increase was tied to a number of economic indicators.

The Commission found that nursing homes experienced increased costs due to inflation between April 30, 1988 and December 31, 1988. The Commission further found that since Mercy's fiscal year ended April 30, 1988, Mercy's rate under the New Plan did not take into account the inflation between said date and December 31, 1988, while those nursing homes with a fiscal year ending December 31, 1988 were allowed under the regulation to have inflation for the entire year factored into their rebased rates. The Commission determined that it was without authority to declare the regulation unconstitutional. Thus, the Commission affirmed the Department's determination of a rebased rate for Mercy in the amount of $48.49 per diem. On appeal to the circuit court the court held that the Department's failure to factor in inflation from April 30, 1988 to December 31, 1988 denied Mercy equal protection under the law.

POINT ON APPEAL

In its sole point on appeal, the Department argues that the circuit court erred by finding that the Department violated Mercy's right to equal protection of the law by setting Mercy's Medicaid rate according to 13 CSR 70-10.010 because all

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[3] Mercy's rebased rate effective July 1, 1990 was set at $48.49 per patient day under the New Plan.

Medicaid providers received a rate which reasonably reflects their cost experience.

Generally, in administrative review cases, an appellate court reviews the decision of the Administrative Hearing Commission. *City of Cabool v. Missouri State Bd. of Mediation*, 689 S.W.2d 51, 53 (Mo. banc 1985). However, administrative agency decisions based upon its interpretation of law are matters of independent judgment for a reviewing court. *Golde's Dep't Stores, Inc. v. Director of Revenue*, 791 S.W.2d 478, 480 (Mo. App. 1990). Therefore, in the case at bar, the focus of our review turns to the equal protection question.

"The first principle of [an equitable protection] inquiry is that a duly enacted statute is presumed to be constitutional." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991). A government action which neither creates suspect classifications nor impinges on a fundamental right will withstand scrutiny if the classification bears some rational relationship to a legitimate government interest. *Id.*

The equal protection guarantee is directed against invidious discrimination. *Id.* "Invidious" means "tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating." *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 761-62 (1993) (citations omitted). The constitutional safeguard of equal protection is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. *Mahoney*, 807 S.W.2d at 512 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)). In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification is imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (citation omitted).

The question presented in the case at bar is whether 13 CSR 70-10.010 denied Mercy equal protection by invidiously discriminating against Mercy due to the fact that other members of Mercy's class under the regulation were allowed to factor in inflation that was experienced from April 30, 1988 to December 31, 1988, while Mercy was not.

The Missouri Medicaid Program determines reimbursement rates for participating nursing homes prospectively on a basis the state determines as reasonable and necessary for efficient care providers. The Medicaid program does not purport to reimburse for actual costs. Rather, reimbursement is for allowable costs as determined by and in accordance with the state regulations. The state has a legitimate interest in controlling the costs of its Medicaid program in setting reimbursement rates for participating nursing homes.

It is not unreasonable for the state to calculate a base figure for allowable costs from the data provided by the participating facilities in their last reviewed cost report. Using said reports serves to simplify accounting procedures and places the facilities on an equal footing by reviewing a full twelve months of costs for each facility thereby taking into account any seasonal fluctuations in costs and averaging cost by a common denominator of twelve months. The fact that different facilities have different fiscal years and their cost reports cover different periods within 1988, does not render the state's regulation for rebasing nursing homes rates unlawful. Although this method of calculation does allow for variables between nursing homes, variables are unavoidable and the state's method of determining rates is not unjustly or irritatingly discriminating.

Mercy argues that it is invidiously discriminated against because other nursing homes are allowed to factor in inflation incurred between April 30, 1988 and December 31, 1988. However, any inflationary variable is outweighed by the state's interest in controlling costs, having an established report upon

which to determine costs (i.e., the fiscal year end cost report), and treating the participating nursing homes similarly for a twelve month period based upon their fiscal year end cost reports.

It is Mercy's position that the Department should calculate inflation for the eight months from April 30, 1988 to December 31, 1988, and increase its base rate by the amount of said inflation. Mercy's position does not allow for the fact that approximately 12% of Mercy's 1988 allowable costs are fixed costs not subject to inflation for which an adjustment would have to be made. Moreover, to truly attempt to treat all facilities alike in regard to inflation, each facility would have to be reviewed to determine actual inflation experienced within 1988. To adjust inflation on the basis of some general index would not allow for geographic differences in the cost of goods and services, purchasing habits, efficient management cost containment practices, actual inflation for a given period of time within 1988 and other variables.

Mercy's argument further lacks support from the evidence received reflecting the average cost, excluding capital costs, for all participating facilities from the 1988 cost reports. Mercy's evidence in this regard reflected that the average daily cost for facilities with a fiscal year ending April 30, 1988 was $42.18, while the average cost for facilities with a fiscal year ending December 31, 1988 was $39.28. This does not support Mercy's argument that it was denied equal protection by not being allowed to factor in inflation from April 30th to December 31st. If inflation were a significant factor, the average cost of facilities reporting December 31st would be expected to be higher than for those reporting April 30th.

To treat all participating facilities absolutely the same, if even possible to accomplish, further presents the potential for a great deal of research and additional accounting procedures that would potentially delay implementation of the revised rates and

increase administrative costs to the detriment of the government and the program participants alike.

It is not unreasonable for the Department to rebase rates for nursing homes participating in the Medicaid program using the fiscal year end 1988 cost reports of the participating nursing homes without any adjustment for inflation for those nursing homes with fiscal years ending before December 31, 1988. Any inequality that the Department's method of rebasing rates might allow is not unreasonable when measured against the state interest in the efficient distribution of limited public funds. The Department's use of fiscal year end 1988 cost reports was a reasonable, effective and efficient method of treating the participating nursing homes in a similar fashion when balanced against the difficulty and additional accounting that would be required by an effort toward a more precise calculation which sought to consider actual inflation experienced by a given nursing home.

The judgment of the circuit court is reversed. The cause is remanded with directions to reinstate the decision of the Commission to the extent that it affirmed the Department's rebased rate for Mercy in the amount of $48.49.

All concur.

/s/ Gary A. Fenner
GARY A. FENNER,
Presiding Judge

APPENDIX B

IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL DISTRICT
STATE OF MISSOURI

No. CV192-468CC

ST. LOUIS SOUTH PARK, INC.,
d/b/a MERCY CONVALESCENT CENTER,
Plaintiff,

vs.

DEPARTMENT OF SOCIAL SERVICES,
and
DIVISION OF MEDICAL SERVICES,
Defendants.

ORDER

NOW on this 31st day of August, 1992, all parties having filed their Briefs and the Court having reviewed them and the record from below including the Legal File, transcript, and evidence, the Court makes the following findings of fact and conclusions of law.

BACKGROUND

Plaintiff filed a Complaint with the Administrative Hearing Commission (hereinafter the "Commission") challenging Defendants' regulation, 13 CSR 70-10.010 (eff. July 1, 1990), setting Plaintiff's Medicaid reimbursement rate. Plaintiff's Complaint alleged that Defendant's application of 13 CSR 70-10.010 violated Plaintiff's rights guaranteed under the Equal Protection clause of the Missouri and the United States Constitutions. The Commission found that it did not have jurisdiction to decide the constitutional question. (L.F. 21). *See also Williams Companies, Inc. v. Department of Revenue*, 799 S.W.2d

602, 604 (Mo. *banc* 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2916 (1991). However, the Commission recognized that Plaintiff was obligated to raise its constitutional claims at the earliest opportunity (L.F. 18), or they would be waived. *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo. *banc* 1991); *Union Electric Co. v. Director of Revenue*, 799 S.W.2d 78, 80 (Mo. *banc* 1990); *Citizens Electric Corp. v. Director of the Dep't of Revenue*, 766 S.W.2d 450, 452 (Mo. *banc* 1989). The Commission also recognized that it was obligated to allow Plaintiff to make its record on the constitutional issue. (L.F. 18); *Boot Heel Nursing Center, Inc. v. Missouri Dep't of Social Services*, 826 S.W.2d 14, 17 (Mo. App. 1992). Therefore, the Commission proceeded to make Findings of Fact. In this Order, the Court adopts the Findings of Fact of the Administrative Hearing Commission, includes others supported by the record, and further rules on the constitutional issue which the Administrative Hearing Commission lacked jurisdiction to do.

FINDINGS OF FACT[1]

This Court does hereby make the following findings of fact:

1. This matter was tried on September 13, 1991, in the Administrative Hearing Commission (hereinafter the "AHC")

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[1] Citations to the transcript of the hearing before the Administrative Hearing Commission held on September 13, 1991, are designated by the abbreviation "Tr." followed by the page number and line number where the fact is supported. Plaintiff's exhibits admitted in the hearing before the Administrative Hearing Commission are designated by the abbreviation "P. Ex." followed by the exhibit number; Defendants' exhibits are designated by the abbreviation "R. Ex." followed by the exhibit number. Citations to the legal file are designated by the abbreviation "L.F." followed by the page and paragraph numbers, where appropriate. Citations to Plaintiff's Complaint filed with the Administrative Hearing Commission of August 10, 1990, will be referred to as "P.'s Complaint" followed by the appropriate paragraph number. Citations to Defendants' Answer filed with the Administrative Hearing Commission of January 29, 1991, will be referred to as "D.'s Answer" followed by the appropriate paragraph number.

based upon a Complaint filed by Plaintiff and the Answer thereto duly filed by the Defendants. (L.F. 14).

2. Plaintiff is aggrieved by the Decision of the AHC entered on March 16, 1992, pursuant to the provisions of § 621.055, RSMo 1986. (L.F. 21).

3. Jurisdiction is in the Circuit Court of Cole County pursuant to the provisions of § 536.110, RSMo 1986, this being an appeal by Plaintiff which has exhausted all administrative remedies provided by law and which is aggrieved by a final decision in a contested case.

4. St. Louis South Park, Inc. (hereinafter "Plaintiff") is a Missouri corporation in good standing. It is licensed under state law by Defendant Department of Social Services as a long term care facility providing nursing care to persons resident within its facility. Plaintiff's facility operates as Mercy Convalescent Center (hereinafter "Mercy") located at 3450 Russell Boulevard, St. Louis, Missouri, as a 254-bed intermediate care facility (ICF). The facility is certified to participate in the Title XIX (Medicaid) program. (L.F. 15, para.1).

5. Defendant Missouri Department of Social Services (hereinafter "Department") is an executive agency of the State of Missouri in which the Missouri Division of Medical Services is contained. The Director of that agency has authority to set Medicaid per diem rates for nursing home facilities participating in the Title XIX (Medicaid) Program in the State of Missouri. (P.'s Complaint, para. 2; D's. Answer, para, 2).

6. Defendant Missouri Division of Medical Services (hereinafter "DMS") is an agency of the State of Missouri and a division of the Missouri Department of Social Services. It may be sued pursuant to § 208.201.5(1), RSMo Supp. 1991. (P.'s Complaint, para. 3; D's. Answer, para, 3).

7. On June 18, 1990, the Department published an emergency regulation in the Missouri Register, 13 CSR 70-10.010, effective July 1, 1990. This regulation came to be known as the "New Plan." The New Plan set new rates for Medicaid participating facilities based on the participants' fiscal year 1988 (hereinafter "FY '88") cost reports. (L.F. 15, para 4).

8. The New Plan divides long-term care facilities participating in the Title XIX (Medicaid) program into four distinct classes. These classes are enumerated in §§ 13 CSR 70-10.010(11)(A)-(D), respectively. (P.'s Ex. 2, printed pages 18-19). Plaintiff is a member of the class defined by § 11(A). (L.F. 15 and 16, paras. 3, 5, and 7).

9. Section 11(A) reads as follows:

> (11) Rate Determination. Subject to limitations prescribed elsewhere in these regulations, a facility's per-diem rate shall be determined by the division as described in this section.
>
> (A) A facility with a valid Medicaid participation agreement in effect on June 30, 1990 and with a cost report on file with the division as of December 31, 1989 with a period ending in calendar year 1988 shall be granted a prospective per-diem rate effective for service dates on and after July 1, 1990. This rate will be the greater of the amount determined in accordance with paragraph (11)(A)1. or 2.
>
> 1. The allowable cost per-patient day as determined by the division from the desk-reviewed and/or field-audited cost report with a period ending in calendar year 1988 will be multiplied by one hundred eleven and one-tenth percent (111.1%). One dollar and six cents ($1.06) will be added to this adjusted cost per-patient day amount to allow for the April 1, 1990 change in the minimum wage and the total will be subject to and limited by the ceiling amount of fifty-

four dollars and ninety-five cents ($54.95). The division will use a cost report which has an ending date in calendar year 1988 which is on file with the division as of December 31, 1989 and no amended information will be accepted after that date. If a facility has more than one (1) cost report with periods ending in calendar year 1988, the report covering a full (12)-month period ending in calendar year 1988 will be used. If none of the reports covers twelve (12) months, the report with the latest period ending in calendar year 1988 will be used.

2. The per-diem rate in effect for services rendered on June 30, 1990.

(P.'s Ex. 2, printed pages 18-19).

10. Section 11(A) creates a class of facilities consisting of providers who (1) have a valid Medicaid participation agreement in effect on June 30, 1990, and (2) a cost report on file with the Division of Medical Services as of December 31, 1989. (P.'s Ex. 2, printed pages 18-19).

11. At all pertinent times, Plaintiff had a valid Title XIX provider agreement in force and was a person authorized under § 208.153 RSMo, 1986, to provide services for which benefit payments were authorized under § 208.152 RSMo, 1986. (L.F. 15, para. 5).

12. As of December 31, 1989, Mercy had a Medicaid cost report for its 1988 fiscal year on file with the Department of Social Services' Division of Medical Services for a period ending on April 30, 1988. (L.F. 15, para. 3; P.'s Ex. 9).

13. Section 11(A) provides that all facilities in that class shall have a new rate calculated by using their allowable costs from each facility's FY '88 Cost Report or each facility's rate in effect on June 30, 1990, whichever is the greater. (L.F. 15-16, para. 7; P.'s Ex. 2, printed pages 18-19.).

14. On June 30, 1990, Mercy had a Medicaid participation agreement in effect. Its Medicaid rate on that date was $46.36. (L.F. 15, para. 5).

15. Mercy's fiscal year ends April 30. (L.F. 15, para. 2).

16. Defendant Department of Medical Services performed a desk audit and review of Mercy's FY '88 cost report. On May 10, 1989, DMS informed Mercy by letter that its allowable costs per patient day (ppd) had been calculated at $40.91 based on the FY '88 Cost Report. (P.'s Ex. 5).

17. By letters dated July 11, 1990, and August 3, 1990, DMS notified Mercy that its Medicaid rate determined under the New Plan and effective July 1, 1990 was $48.49 per patient day (ppd). (L.F. 15-16, para. 7). The long term care ceiling or highest rate payable under the New Plan was $55.92. (P.'s Ex. 12; P.'s Ex. 2, printed pages 11 and 19).

18. Using the costs as determined on the 1988 cost report, DMS calculated Mercy's "1988 Base Rate" to be $46.52 according to the formula set out at Paragraph (11)(A)1. of the New Plan by multiplying Mercy's FY '88 allowable costs ($40.91 ppd) by 111.1% (i.e. increasing costs by 11.1%) and adding to this product the rate adjustment of $1.06 ppd attributable to the increase in the federal minimum wage. (L.F. 15-16, para. 7).

19. The New Plan's 111.1% increase to the Medicaid rate is an increase for inflation. The 111.1% inflation adjustment represents an adjustment for inflation of 3.7% per year, not compounded, for the three year period beginning July 1, 1988, and ending June 30, 1991 (3.7%/year x 3 years = 11.1%). (L.F. 15-16, para. 7).

20. Because the New Plan required Defendant to determine Mercy's rate as the greater of the "1988 Base Rate" ($46.52) (§ (11)(A)1.) or its rate for services provided on June 30, 1990 ($46.36) (§ (11)(A)2.), DMS set Mercy's prospective rate at

$46.52 pursuant to § (11)(A)1. (L.F. 15-16, para. 7; P.'s Ex. 2, printed pages 18-19).

21. As required under subsection (12)(A) for all providers, DMS added $0.97 in adjustments described in that section to the $46.52 which results in a Medicaid prospective rate of $47.49. Petitioner, an intermediate care-only facility, received a $1.00 adjustment to compensate it for nursing consultants required to be in compliance with the requirements of the Omnibus Budget Reconciliation Act of 1987. With these two additions, Mercy's rate is $48.49. (L.F. 15-16, para. 7).

22. In 1988, of the 376 nursing homes participating in the Medicaid program, 94% had fiscal years ending after April 30, 1988. Of the 376 nursing homes participating in the Medicaid program in 1988, the majority (208) or 55.32% had fiscal years ending December 31, 1988. (L.F. 16, para. 8, P.'s Ex. 17).

23. Nursing home providers' experienced increased costs due to inflation between April 30, 1988, and December 31, 1988. (L.F. 16, para. 9).

24. Mercy's FY '88 cost report did not include any costs for time periods after April 30, 1988. Mercy's costs from May 1, 1988 through December 31, 1988 continued to increase because of inflation. Nevertheless, Mercy's rate set under the New Plan did not include this inflation to Mercy's costs which occurred between May 1, 1988, and December 31, 1988. (L.F. 16, paras. 9 and 10).

25. Mercy's 1988 allowable costs, and thus its 1988 Base Rate and New Plan rate, reflected eight months less inflation than similarly situated providers whose fiscal years ended December 31. (L.F. 16, para. 10).

26. Providers whose fiscal years end on December 31 received the benefit of having the inflation they experienced from May 1, 1988, through December 31, 1988, counted twice

under the New Plan—first, in their 1988 allowable costs, which already reflect that inflation, and again in the 111.1% inflation adjustment, which includes two-thirds[2] of 3.7% for that period. (L.F. 16, n. 2).

27. Because the New Plan rate is based on each provider's FY '88 allowable costs, providers whose fiscal years ended later than April 30, unlike Mercy, received new rates which took into account inflation which occurred between May 1, 1988, and December 31, 1988 according to their fiscal year end. (L.F. 16-17, para. 11).

28. An adjustment of $1.01 ppd to Mercy's rate properly accounts for the inflation that occurred between the end of Mercy's fiscal year in 1988 and the end of calendar year 1988. This amount is calculated by annualizing the New Plan's 36 month inflation factor (111.1%/36 = 0.3083%), multiplying that amount by eight for the eight month period in 1988 for which Mercy received no inflation adjustment (0.3083% x 8 = 2.4667%), and multiplying that product by Mercy's FY '88 allowable costs per patient day (2.4667% x $40.91 ppd = $1.01 ppd). (L.F. 17, para. 11).

29. The entire calculation to arrive at this figure, shown in P.'s Ex. 10, is as follows:

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[2] The Commission's findings state that the 111.1% adjustment "includes one-half of 3.7 percent. . ." (L.F. 16, n.2). This Court believes that is a mathematical error. Eight-twelfths (8/12) of a year is two-thirds (2/3) rather than one-half (1/2) of the 3.7 yearly inflation factor. This Court so finds.

Table I

Inflation factor - per State in rebasing	11.1%
Divided by months from 1988 rebase year mid-point to rebase date	÷ 36
Inflation factor - per month	.3083%
x May to December months differential	x 8
Applicable inflation factor - additional	2.4667%
Base period costs per State in rebasing	$40.91
x Applicable additional inflation factor	x2.4667%
Additional PPD[0] inflated costs	$ 1.01
State's 11.1% inflated base period costs	$45.46
Add $1.06 minimum wage increase effective 04-01-90	$ 1.06
? .97 rate increase effective 07-01-90	$ .97
Consultant adjustment	$ 1.00
Proper Medicaid rate at 07-01-90	$49.50
Rate paid by State at 07-01-90	$48.49
Rate increase requested	$ 1.01

30. The Health Care Financing Administration (HCFA) measures inflation in the nursing home industry by the DRI Index. The DRI Index for the last eight months of 1988 was 3.851%, substantially higher than the 2.4667% used by Defendants to calculate the effect of the unequal application of the 111.1% adjustment factor. (L.F. 17, paras. 12 and 13).

31. Since 1981 Defendants have granted each nursing facility an annual trend factor effective July 1 of each fiscal year irrespective of a facility's fiscal year end. Those trend factors are calculated on the basis of a percentage of the average rate paid all facilities reduced to a specific dollar figure. Section 208.169.1(5)(a)-(d), RSMo 1986; 11 *Mo. Reg.* p. 1493 (July 16, 1986) ("two percent (2%) of the average per-diem rate paid all facilities on June 1, 1986 shall be added to each facilities' rate."); 12 *Mo. Reg.* p. 95 (July 13, 1987) ("two percent (2%) of the average per-diem rate paid all facilities on June 1, 1987 shall be added to each facilities' rate."); 14 *Mo. Reg.* p. 19 (January 2, 1989) ("two percent (2%) of the average per-diem rate paid all facilities on June 1, 1988 shall be added to each facilities' rate."); 14 *Mo. Reg.* p. 1155 (September 1, 1989) ("one and one-half percent (1.5%) of the average weighted per-diem rate paid all facilities on June 1, 1989 shall be added to each facilities' rate").

32. The Commission found that for all practical purposes, the 111.1% increase is an inflation factor. (L.F. 16, note 1). This Court so finds.

CONCLUSIONS OF LAW

This Court does hereby make the following conclusions of law:

Participation in the Title XIX (Medicaid) Program is voluntary. It does not represent a fundamental right subject to the strict scrutiny test under the Equal Protection Clauses of the Missouri and United States Constitutions. Nor is Petitioner a member of a class afforded heightened scrutiny under those constitutional provisions. Therefore, to determine the constitutionality of 13 CSR 70-10.010(11)(A) or its application, the rational basis test is applied. *Adams v. The Children's Mercy Hospital*, No. 73867, slip. op. at 7 (Mo. *banc* May 19, 1992); *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 10 (Mo. *banc* 1992). Under the rational basis test, the regulation or its application will be upheld

if the regulation or its application is rationally related to a legitimate government purpose. *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503, 512 (Mo. *banc* 1991). Increasing the reimbursement rate of providers participating in the Title XIX (Medicaid) Program to account for the costs increases they experienced due to inflation is a legitimate government purpose. Therefore, the Court must decide if the regulation or its application is rationally related to that purpose. The Court finds that it is not.

Legislation may be struck down under the equal protection clause when the classification as applied has no rational basis. *Mahoney*, 807 S.W.2d at 513; *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S. Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). The purpose of the 111.1% adjustment, as found by the Administrative Hearing Commission, is to compensate providers for the inflation they experienced to their costs. (L.F. 16, n.1). The application of the 111.1% to Plaintiff's costs as of its fiscal year end is not rationally related to that purpose. The following example conclusively shows the discrimination in Defendants' unequal application of the 111.1% adjustment factor.

Suppose raw food costs $3.00 per patient day on April 30, 1988, while the same food costs $4.00 on December 31, 1988 because of inflation.[3] Under the New Plan, Plaintiff's food costs of $3.00 are inflated by 111.1% which totals $3.33. Yet the facility with a December 31 fiscal year end would have the $4.00 increased by the 111.1% yielding $4.44. Even though both facilities had to pay $4.00 for food on December 31, 1988, only one facility's rebased rate includes that inflationary increase.

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[3] These figures are not accurate representations of either a facility's cost or the effect that inflation would have on that cost for the eight month time period in issue. They are merely illustrative.

While it is constitutionally permissible to treat different classes dissimilarly, *Schnorvus v. Director of Revenue*, 790 S.W.2d 241 (Mo. *banc* 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 679, 112 L.Ed.2d 671 (1991), Missouri cases addressing equal protection challenges hold that all members within a class shall be treated equally. *Ballentine v. Nester*, 164 S.W.2d 378, 382-383 (Mo. *banc* 1942); *Missouri Pacific Ry. Co. v. Kirkpatrick*, 652 S.W.2d 128, 133-134 (Mo. *banc* 1983); *Carney v. Hanson Oil Co., Inc.*, 690 S.W.2d 404 (Mo. *banc* 1985); *State ex rel. Classics Tavern v. McMahon*, 783 S.W.2d 463, 466 (Mo. App. 1990). Furthermore, all persons similarly situated shall be treated equally both in the liabilities imposed and the benefits conferred by the government. *Bauer v. Kincaid*, 759 F. Supp. 575, 591-592 (W.D. Mo. 1991).

Defendants' application of the 111.1% inflation factor to Plaintiff's costs violates Plaintiff's rights guaranteed under the Equal Protection Clause (Article 1, Section 2) of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution by treating similarly situated providers unequally. Defendants' application of the 111.1% inflation factor reimburses the majority of providers all the inflation they experienced during calendar year 1988 multiplied by 111.1%, but does not reimburse Plaintiff for this same inflation which it experienced.

Depending on when a facility's fiscal year ends, its cost report reflects a different amount of inflationary cost increases which occurred in 1988. Thus, Defendants have treated members of the Section 11(A) class of facilities differently. The overwhelming majority of facilities in the Section 11(A) class had fiscal years ending on December 31, 1988. The 1988 fiscal years end for the remainder of the class was sometime before December 31, 1988. Because Mercy's fiscal year ended April 30, 1988, Mercy was denied eight months' worth of inflation otherwise granted to the majority of providers in its class.

Other states also find that the government may not arbitrarily and discriminately confer the benefit of state funding upon only some members of a designated class. *See McGuire v. Switzer*, 734 F. Supp. 99, 113 (S.D.N.Y. 1990) (the court denied the state's Motion to Dismiss plaintiff's equal protection challenge to the state's funding of rehabilitation programs for impaired individuals).[4] *See also Jimenez v. Weinberger*, 417 U.S. 628, 94 S. Ct. 2496, 41 L.Ed.2d 363 (1974) (the denial of Social Security benefits to nonlegitimated illegitimate children born after the onset of disability was not reasonably related to the valid governmental interest of preventing spurious claims and thus, contravened equal protection guarantees); *Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973), *aff'd*, 416 U.S. 901, 94 S. Ct. 1604, 40 L.Ed.2d 106 (1974) (unequal treatment of children requiring public assistance unconstitutionally violated equal protection rights).

Furthermore, Defendants' arbitrary choosing of a provider's fiscal year end as the basis for rebasing its Medicaid reimbursement rate is analogous to the arbitrary choice made by the New Mexico legislature in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S. Ct. 2862, 86 L.Ed.2d 487 (1985). In *Hooper*, Vietnam veterans residing in the state prior to May 8, 1976 were given a tax exemption. This exemption was challenged on equal protection grounds. The stated purposes of the law were to encourage veterans to settle in New Mexico and to express the state's appreciation of its citizens. *Hooper*, 105 S. Ct. at 2866.

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[4] The *McGuire* Court stated that "While defendants are correct that a state may limit funding for vocational rehabilitation services, *it may not do so in an arbitrarily discriminatory manner*.... Since there is no rational basis for the substantially higher cap on tuition and maintenance expenditures that the state applies to CBVH's clients [agency providing funding for blind persons] that it applies to OVR's clients [agency providing funding for paraplegic persons], plaintiff's § 1983 claim challenging these regulations on equal protection grounds may stand." *McGuire v. Switzer*, 734 F. Supp. at 114-115 (emphasis added).

The Court held that a state "may award certain benefits to all its bona fide veterans, because it then is making neither an invidious nor irrational distinction among its residents." *Hooper*, 105 S. Ct. at 2867. Finding that the New Mexico exemption conferred a benefit upon only select veterans, *Id.*, the Court held the law violated the guarantees of the Equal Protection Clause. *Hooper*, 105 S. Ct. at 2869. *Accord Zobel v. Williams*, 457 U.S. 55, 102 S. Ct. 2309, 72 L.Ed.2d 672 (1982).

As did the Court in *Hooper*, this Court finds that Defendants' application of the 111.1% inflation factor violates Plaintiff's Equal Protection guarantees by using an arbitrarily chosen date upon which to base the distribution of governmental benefits. Furthermore, Defendants' application of the 111.1% inflation factor is inconsistent with Defendants' prior practice of granting providers a reimbursement rate increase due to inflation known as "trend factor increases." These increases have been granted as of July 1 irrespective of a provider's fiscal years-end. Applying the 111.1% to a facility's cost as of a date certain, such as December 31, would treat similarly situated providers equally.

The Defendant is hereby Ordered to increase Plaintiff's current Medicaid per-diem reimbursement rate ($48.49) in the amount of $1.01 effective July 1, 1990, plus interest from that date as provided in Section 621.055, RSMo. plus applicable trend factors.

/s/ Byron Kinder
BYRON KINDER,
CIRCUIT JUDGE

APPENDIX C

Before the
Administrative Hearing Commission
State of Missouri

No. 90-001199SP

ST. LOUIS SOUTH PARK, INC.,
d/b/a MERCY CONVALESCENT CENTER,
Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MEDICAL SERVICES,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

St. Louis South Park, Inc., which does business as Mercy Convalescent Center (Mercy), filed a complaint on August 10, 1990, seeking this Commission's determination that it is entitled to a higher Medicaid rate and that the Department's regulation invidiously discriminates against certain members of the same class created by the Department's ratemaking regulation, in violation of the Article I, § 2, of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution.

This Commission convened a hearing on the complaint on September 13, 1991. Harvey M. Tettlebaum and Barbara L. Miltenberger of Husch, Eppenberger, Donohue, Cornfeld & Jenkins, represented Mercy. William E. Cornwell of the Department's Division of Legal Services, represented the Department. John Pruitt Killian filed the Department's brief.

Pursuant to § 536.080.1, RSMo 1986, the parties submitted written arguments. The Department filed a proposed findings of fact and conclusions of law and brief arguing only the issue of

this Commission's jurisdiction to decide the constitutional issue. Mercy filed the last brief on February 24, 1992.

Findings of Fact

1. St. Louis South Park, Inc., is a Missouri corporation in good standing. The Department has licensed it to operate Mercy Convalescent Center located at 3450 Russell Boulevard, St. Louis, Missouri, as a 254-bed intermediate care facility and certified it to participate in the Missouri Medicaid program.

2. Mercy's fiscal year ends April 30.

3. On December 31, 1989, Mercy had a Medicaid cost report with an end date in 1988 (FY88) on file with the Department of Social Services' Division of Medical Services.

4. On June 18, 1990, the Department published an emergency regulation in the Missouri Register, 13 CSR 70-10.010, effective July 1, 1990. This regulation came to be known as the "New Plan." The New Plan made new rates for Medicaid participants. The new rates were based on participants' cost reports for FY88. The Department chose FY88 because that was the most recent year for which the Department had cost reports from every participant and upon which the Department had made all necessary desk review adjustments.

5. On June 30, 1990, Mercy had a Medicaid participation agreement in effect. Its Medicaid rate on that date was $46.36.

6. The Department desk-reviewed Mercy's FY88 cost report and determined that its allowable costs for FY88 were $40.91.

7. On July 11, 1990, and August 3, 1990, the Department notified Mercy that its Medicaid rate was $48.49 per patient day (ppd), effective July 1, 1990. The Department determined that rate under the new plan. Using the costs as determined on the 1988 cost report, the Department calculated Mercy's "1988 base rate" of $46.52 according to the formula set out at Paragraph

(11)(A)1 of the New Plan by multiplying Mercy's FY88 allowable costs ($40.91 ppd) by 111.1 percent (i.e. increased costs by 11.1%) and adding to this product the minimum wage adjustment of $1.06 ppd. The 11.1 percent increase under the New Plan is an inflational adjustment[1] of 3.7 percent per year, not compounded, for the three year period beginning July 1, 1988, and ending June 30, 1991. (3.7%/year x 3 years = 11.1%). Because the New Plan required the Department to determine Mercy's rate as the greater of the "1988 base rate" or its rate for services provided on June 30, 1990 ($46.36), the Department set Mercy's rate at $46.52. As required under subsection (12)(A), the Department added 97¢ in adjustments to arrive at the $47.49 Medicaid prospective rate figure. The Department also added a $1.00 adjustment for consultants given to all intermediate care only facilities in order to comply with the requirements of the Omnibus Budget Reconciliation Act of 1987 for the total amount of $48.49.

8. In 1988, of nursing homes participating in the Medicaid program, 6% had fiscal years ending before May 1, 1988, and 94% had fiscal years ending after April 30, 1988. In 1988, of nursing homes participating in the Medicaid program, 55.32% had fiscal years ending December 31, 1988.

9. Nursing home providers experienced increased costs due to inflation between April 30, 1988, and December 31, 1988.

10. Because Mercy's FY88 cost report did not include any costs later than April 30, 1988, Mercy's rate set under the New Plan did not take into account the inflation which occurred between May 1, 1988, and December 31, 1988. Mercy's allowable costs, and thus its 1988 base rate and New Plan rate,

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[1] The Department presented testimony to the effect that the 11.1 percent increase was not solely an increase for inflation, but that it was tied to a number of economic indicators. We conclude that, for all practical purposes, it is an inflational factor.

would necessarily reflect eight months less inflation than other similarly situated providers whose fiscal years ended December 31.[2]

11. Because the New Plan rate is based on each provider's FY88 allowable costs, providers whose fiscal year ended later than Mercy's received new rates which took into account some or all of the inflation which occurred during between May 1, 1988, and December 31, 1988. On the other hand, Mercy's allowable costs, and thus its 1988 base rate and New Plan rate, would include more inflation than a similarly situated provider whose fiscal year ended prior to April 30.

12. An adjustment of $1.01 ppd to Mercy's rate would properly account for the inflation that occurred between the end of Mercy's fiscal year in 1988 and the end of the calendar year. This adjustment was calculated by annualizing the New Plan's 36 month inflation factor (111.1 percent/36 = 0.3083 percent), multiplying that amount by eight for the eight month period in 1988 for which Mercy received no inflation adjustment (0.3083 percent x 8 = 2,4667 percent), and multiplying that product by Mercy's FY88 allowable costs per patient day (2,4667 percent x $40.91 ppd = $1.01 ppd).

13. The Health Care Financing Administration (HCFA) measures inflation in the nursing home industry by the DRI Index. The DRI Index for the last eight months of 1988 was 3.851 percent, substantially higher than the figure calculated in Finding of Fact 12 (2,4667 percent).

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[2] Providers whose fiscal years end on December 31 would receive the benefit of having the inflation they experienced from July 1, 1988, through December 31, 1988, counted twice under the New Plan—first, in the 1988 allowable costs, which already reflect that inflation, and again in the 11.1 percent inflation adjustment, which includes one-half of 3.7 percent for that period.

Conclusions of Law

I

Mercy complains that the Department's regulation, the New Plan, aggrieves it. Mercy invokes this Commission's jurisdiction under § 208.156.4.[3]

The general scheme of § 208.165, as it relates to this Commission, is to allow participants a hearing before us on issues the Department has had a chance to adjudicate. Section 208.156.2 gives Medicaid participants relief from the decisions the Department makes on the participants' claims to the Department. Subsection 4 allows a participant aggrieved by any of the Department's or Division's regulations a hearing before this Commission. Unlike subsection 2, the legislature does not require the participant to make a claim to the Department before invoking our jurisdiction under subsection 4 because the Department has already decided the issue when it entered its order of rulemaking. A claim to the Department for a rate increase based on issues it has just decided would be superfluous. Section 208.156.4 complements subsection 2 by giving Medicaid participants relief from decisions the Department makes on its own initiative.

The sole issue presented by Mercy is whether its constitutional right to equal protection of the laws is violated by the New Plan's use of the FY88 cost report in establishing new rates. The Department argues that we have no jurisdiction to entertain this challenge to the constitutionality of its regulation because Mercy is seeking a declaratory judgment. We disagree. The presence of a constitutional issue does not remove the case from an executive agency's jurisdiction to an exclusively judicial domain. A party challenging the constitutionality of a regulation

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[3] All references to statutes are to the 1986 revision of the Missouri Revised Statutes, unless otherwise noted.

must exhaust administrative remedies if the challenge requires a review of facts, as does Mercy's. *Boot Heel Nursing Center, Inc. v. Missouri Dep't of Social Serv.*, No. WD44636 (Mo. App., W.D., January 7, 1992), slip op. at 5-6. Mercy must raise its constitutional challenge at the earliest opportunity and we must allow Mercy to make a record upon that issue. We have, therefore, heard the complaint and made findings of fact relevant to the equal protection issue. *Citizens Electric Corporation v. Director of the Department of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989).

II

Mercy argues that section (11) of the Department's Regulation 13 CSR 70-10.010 is unconstitutional. Section (11) of the regulation provides:

> Rate Determination. Subject to limitations prescribed elsewhere in these regulations, a facility's per-diem rate shall be determined by the division as described in this section.
>
> (A) A facility with a valid Medicaid participation agreement in effect on June 30, 1990 and with a cost report on file with the division as of December 31, 1989 with a period ending in calendar year 1988 shall be granted a prospective per-diem rate effective for service dates on and after July 1, 1990. This rate will be the greater of the amount determined in accordance with paragraph (11)(A)1. or 2.
>
> 1. The allowable cost per-patient day as determined by the division from the desk-reviewed and/or field-audited cost report with a period ending in calendar year 1988 will be multiplied by one hundred eleven and one-tenth% (111.1%). One dollar and six cents ($1.06) will be added to this adjusted cost per-patient day amount to allow for the April 1, 1990 change in the minimum wage and the total

will be subject to and limited by the ceiling amount of fifty-four dollars and ninety-five cents ($54.95)[.]

2. The per-diem rate in effect for services rendered on June 30, 1990.

The section creates a class of facilities: those who have (1) a valid Medicaid participation agreement in effect on June 30, 1990, and (2) a cost report on file with the division as of December 31, 1989, with a period ending in calendar year 1988. It then provides that all facilities in that class shall have a new rate. The new rate shall be determined by performing some mathematical operations on a certain amount. That amount is drawn from the facility's FY88 cost report.

Mercy argues that the Plan gives different treatment to members of the same class of facilities it creates in subsection (11)(A) in violation of Article I, § 2, of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. It asserts that some facilities' FY88 ended on December 31, but some facilities' FY88 ended earlier. The cost of any facility's operation increased over the course of 1988. Thus, the cost reports would capture differing amounts of inflationary cost increases that occurred in 1988. Mercy argues that to deny that increase, eight months' worth in Mercy's case, to some facilities while granting it to others is invidious discrimination within the class in violation of Article I, § 2, of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. It cites case law from several jurisdictions in support of that argument.

Mercy asks us to remedy the alleged unconstitutionality of the regulation by adjusting its rate to account for the inflation occurring between the end of its fiscal year and December 31, 1988, just like facilities whose FY88 ended on December 31. See calculations in Finding of Fact 12. Mercy contends that $1.01 should be added to its Medicaid rate to accommodate for

inflation between April and December 1988. The Department set Mercy's rate at $48.49; if we added $1.01 to that amount, the sum would be $49.50.

Mercy urges that we have jurisdiction to consider the regulation's constitutional problems in setting its rate. It reminds us that in *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990), the Missouri Supreme Court instructed that this Commission "must resort to the statutes" over a conflicting regulation and "has full authority to reach a decision on the law as its finds it" to determine a taxpayer's liability. The law as we had found it included the Director of Revenue's regulation because we believed that a regulation was the law until a judicial body declared otherwise. The Court held that we must disregard regulations contrary to revenue statutes because only the legislature has the authority to authorize taxes. *Id.* at 207.

To use the terminology of *Bridge Data*, Mercy suggests that this Commission must resort to the constitution over the conflicting regulation to determine its rate, has "full authority to reach a decision on the law as it finds it," and that "the law as [this Commission] finds it" does not include the constitutional infirmity of the Department's regulation just as it did not include the statutory infirmity of the Director's regulation in *Bridge Data*. Alternatively, Mercy urges us to find as a fact that the regulation invidiously discriminates against it.

Despite *Bridge Data*, we conclude that we cannot do what Mercy asks. *Bridge Data* held that we are authorized to ignore revenue regulations which are directly contrary to the substance of taxing statutes. The court based that holding on the principle that under our state constitution only statutes can authorize taxes, and no agency can alter or modify those statutory provisions with its regulations. *Id.* at 207. However, there is no constitutional principle preventing the legislature from delegating to the De-

partment the authority to determine Medicaid reimbursement. The legislature specifically authorized Medicaid "payments to be made on the basis of reasonable cost for the care or reasonable charge for the services *as defined and determined by the division of medical services*, unless otherwise hereinafter provided[.]" Section 208.152.1 (emphasis added).

Furthermore, just four months after it issued its opinion in *Bridge Data*, the Missouri Supreme Court specifically instructed that this Commission "is without authority to decide" an issue regarding the constitutionality of a statute. *Williams Companies v. Director of Revenue*, 799 S.W.2d 602, 604 (Mo. banc 1990). That holding leaves intact the Court's previous holdings that the legislature cannot have given us the power to declare the constitutional validity or invalidity of a regulation. Such an inquiry remains a purely judicial function. *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982).

We conclude that we cannot make conclusions of law on the issue of equal protection.

Mercy does not assert any error in the computation of its rate. We therefore conclude that Mercy's rate shall be as the Department determined, $48.49 ppd.

Summary

This Commission, therefore, concludes that Mercy's rate shall be $48.49 per patient day effective July 1, 1990. Interest, trend factors, and other adjustments apply as provided by law.

ORDERED on March 16, 1992.

/s/ Paul R. Otto
PAUL R. OTTO
Commissioner

APPENDIX D

IN THE SUPREME COURT OF MISSOURI

No. 75981
W.D. No. 46944

May Session, 1993

St. Louis South Park, Inc.,
d/b/a Mercy Convalescent,
Respondent,

vs. (TRANSFER)

Missouri Department of Social Services,
Division of Medical Services,
Appellant.

Now at this day, on consideration of respondent's application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1993, and on the 17th day of August, 1993, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 17th day of August, 1993.

/s/ Thomas F. Simon Clerk

_____ D.C.

APPENDIX E

Missouri Court of Appeals
Western District
1300 Oak Street
KANSAS CITY, MO. 64106-2970

PEGGY STEVENS MCGRAW AREA CODE 816-889-3600
CLERK-DOCKET ATTORNEY FAX 816-889-3668

June 1, 1993

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: ST. LOUIS SOUTH PARK, INC. DBA MERCY CONVALES, RESPONDENT

vs.

DEPARTMENT OF SOCIAL SERVICES, APPELLANT

WD# 46944

Please be advised that Respondent's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

cc: Harvey M. Tettlebaum
Richard Beaver

APPENDIX F

IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL DISTRICT
STATE OF MISSOURI

No. CV192-468 CC

ST. LOUIS SOUTH PARK, INC.,
d/b/a MERCY CONVALESCENT CENTER,
Plaintiff,

vs.

DEPARTMENT OF SOCIAL SERVICES,
and
DIVISION OF MEDICAL SERVICES,
Defendants.

PETITION FOR JUDICIAL REVIEW

COMES NOW Plaintiff St. Louis South Park, Inc. d/b/a Mercy Convalescent Center, by and through its attorney, and states as follows:

1. This cause of action is brought pursuant to the provisions of § 536.100, RSMo 1986, as an appeal by Plaintiff which has exhausted all administrative remedies provided by law and which is aggrieved by a final decision in a contested case. Plaintiff is aggrieved by the Decision of the Administrative Hearing Commission made in its Findings Of Fact And Conclusions Of Law entered on March 16, 1992, under § 621.055, RSMo 1986.

2. Plaintiff St. Louis South Park, Inc. operates a long-term care facility known as Mercy Convalescent Center located at 3450 Russell, City of St. Louis, Missouri. It is licensed as a intermediate care facility (ICF) pursuant to § 198.045, RSMo Supp. 1989, and participates in the Title XIX (Medicaid) Program.

3. Defendant Missouri Department of Social Services is an agency of the State of Missouri in which the Missouri Division of Medical services is contained. The Director of that agency has authority to set Medicaid per diem rates for nursing home facilities participating in the Title XIX (Medicaid) Program in the State of Missouri.

4. Jurisdiction is in this Court pursuant to § 536.110, RSMo 1986.

5. On March 16, 1992, the Administrative Hearing Commission issued its Findings Of Fact And Conclusions Of Law (hereinafter "Decision") denying Plaintiff's requested adjustment of $1.01 to its fiscal year 1988 allowable costs, a copy of which is attached hereto as Exhibit "A" and made a part hereof.

6. In its Decision, the Administrative Hearing Commission held that it lacked jurisdiction to rule the constitutional issue presented. This appeal presents to the Court the constitutional issue of whether Defendants Missouri Department of Social Services and Division of Medical Services denied Plaintiff its rights guaranteed under the Equal Protection Clause of the Constitutions of the United States (Fourteenth Amendment) and Missouri (Article I, Section 2) by treating it differently from other nursing homes in the same class of nursing homes in Defendants' reimbursement regulation (13 CSR 70-10.010(11) (7/01/90)) when setting Plaintiff's reimbursement rate under that regulation. Plaintiff alleges that on the facts as found by the Administrative Hearing Commission, as well as other evidence in the record, this Court should rule as a matter of law that Defendants' reimbursement plan 13 CSR 70-10.010(11) (7/01/90), or as applied, violates Plaintiff's right to equal protection under the law.

7. Plaintiff furthers alleges that the Administrative Hearing Commission erred in declining to rule the aforementioned constitutional issue.

WHEREFORE, Plaintiff prays the Court for its decision that Defendants' reimbursement plan (13 CSR 70-10.010(11) violates Plaintiff's rights guaranteed under the United States and Missouri Constitutions to equal protection under the law and finding that Plaintiff is entitled to an increase in its fiscal year 1988 allowable costs of $1.01 per day effective July 1, 1990, plus any applicable adjustments, trend factors, and interest as provided by law.

EXHIBITS OMITTED

Respectfully submitted,

HUSCH & EPPENBERGER
/s/ Harvey M. Tettlebaum
HARVEY M. TETTLEBAUM
#20005
235 East High Street, Suite 300
Post Office Box 1251
Jefferson City, MO 65102
Phone: (314) 635-9118

ATTORNEY FOR PLAINTIFF.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, by registered mail, postage prepaid, or hand delivered this 13th day of April, 1992, to:

John Pruitt Killian
Division of Legal Services
Department of Social Services
Broadway Building - 2nd Floor
P. O. Box 1527
Jefferson City, MO 65102

/s/ Harvey M. Tettlebaum
HARVEY M. TETTLEBAUM

APPENDIX G

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

AHC No. 90-001199SP

ST. LOUIS SOUTH PARK, INC.
d/b/a MERCY CONVALESCENT CENTER,
3450 Russell,
St. Louis, MO 63104,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES,
Broadway State Office Building,
Jefferson City, MO 65102,

and

DIVISION OF MEDICAL SERVICES,
308 East High Street,
Jefferson City, MO 65101,
Respondents.

COMPLAINT

COMES NOW Petitioner St. Louis South Park, Inc. d/b/a Mercy Convalescent Center and for its Complaint states:

1. St. Louis South Park, Inc. is a corporation in good standing in Missouri. It operates a long-term care facility known as Mercy Convalescent Center located at 3450 Russell Boulevard, St. Louis, City of St. Louis, Missouri. This facility is licensed under state law as an intermediate care facility (ICF) providing long-term residential care to persons resident within the nursing home facility it maintains pursuant to Section 198.015, RSMo Supp. 1989. Petitioner is certified pursuant to Section 198.045, RSMo 1986, to participate in the Title XIX (Medicaid) Program. At all

times relevant herein, Petitioner had a valid Title XIX participation agreement with Respondent.

2. Respondent Missouri Department of Social Services is an agency of the State of Missouri in which the Missouri Division of Medical Services is contained. The Director of that agency has authority to set Medicaid per diem rates for nursing home facilities participating in the Title XIX (Medicaid) Program in the State of Missouri.

3. Respondent Missouri Division of Medical Services is an agency of the State of Missouri and a division of the Missouri Department of Social Services. It may be sued. § 208.201.5(1), RSMo.

4. This Complaint is filed to seek a hearing before the Administrative Hearing Commission from the decision of Respondents evidenced by their letters of July 11, 1990, and August 3, 1990, attached hereto as Exhibit "A" and Exhibit "B", respectively, and incorporated herein. In their decision, Respondents granted Petitioner a rate of $48.49 (hereinafter "New Rate"). The Medicaid per diem reimbursement rate which Petitioner claims owing it based upon allowable costs reported in its Fiscal Year-End 1988 Cost Report properly inflated is $55.92.

5. On June 18, 1990, Respondents promulgated an Emergency Rule denominated 13 CSR 70-10.010. (15 Mo.Reg., pp. 934-944). The effective date of said Emergency Regulation was July 1, 1990. (The Emergency Regulation is hereinafter referred to as the "New Plan"). Section (11) of the New Plan provides for the setting of a per diem reimbursement rate for facilities such as that operated by Petitioner. Petitioner's facility had a valid Medicaid participation agreement in effect on June 30, 1990, and a Title XIX Cost Report on file with Respondent Division of Medical Services as of December 31, 1989, with a period ending in calendar year 1988. This New Rate is for services provided to Medicaid eligible recipients for care provided on or after July 1,

1990. The New Rate granted Petitioner by Respondents as described in Respondents' letter of July 11, 1990, is a final decision of the Director of Respondent Department of Social Services. As such, it is subject to hearing pursuant to Section (15) of Respondents' New Plan.

6. This cause of action is filed under Section 208.156, RSMo, and Section 621.055, RSMo, and Section (15) of the New Plan.

7. The Respondents erred in granting Petitioner its New Rate for one or more of the following reasons:

A. By their decision of July 11, 1990, Respondents improperly disallowed certain costs ("Disallowed Costs") incurred by Petitioner during its 1988 fiscal year which were allowable, necessary, and reasonable costs under Respondents' then existing Reimbursement Plan.

B. The decision of Respondents does not result in reimbursement of reasonable costs to Petitioner and Respondents have no standards by which to measure the reasonableness of the Disallowed Costs incurred by Petitioner.

C. The decision by Respondents violates the provisions of Section 208.152, subsections 1, 8 and 9, RSMo Supp. 1990 (S.B. 765).

D. Respondents, by benefiting from the care provided by Petitioner and costs Petitioner has incurred, but failing to pay for same, are denying Petitioner their property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Missouri Constitution.

E. Respondents have failed to account for costs which Petitioner must incur to comply with the provisions of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) P.L. 100-203, and implementing regulations promulgated by the Health Care Financing Administration.

F. Respondents have exceeded their jurisdiction in failing to reimburse for allowable costs incurred in connection with the provision of care to Medicaid eligible recipients at Petitioner's facility.

G. Respondents have utilized standards for determining allowable, reasonable and necessary costs which are beyond their jurisdiction to use.

H. Respondents have unlawfully adopted policies which deny reimbursement of Petitioner's Disallowed Costs in violation of the provisions of Section 536.010, *et seq.*, and have applied that to Petitioner.

I. Respondents have made mathematical and other errors in the computation of Petitioner's New Rate which result in a Medicaid per diem reimbursement rate unrelated to Petitioner's fiscal year-end 1988 costs.

J. Respondents have violated federal law which requires Respondents to determine Medicaid payment rates for long-term care facilities in conformity with the requirements of the Medicaid statute and regulations. 42 U.S.C. § 1396a(a) (13)(A) and 42 C.F.R. 447.250, *et seq.* Respondents' decision violates this requirement since the resulting payment rate is inconsistent with the statutory and regulatory provisions which: (1) require that Medicaid rates for long-term care facilities be adequate to meet the costs incurred by efficiently and economically operated facilities providing services in accordance with federal and state laws, regulations, and quality and safety standards; (2) require that rates take into account economic trends and conditions during the period for which the rates are set; and (3) prohibit the state from setting payment rates based solely on budgetary considerations.

K. Respondents have applied their policies retrospectively to disallow costs incurred by Petitioner in violation of Article I, Section 13 of the Constitution of Missouri (1945) and Article I, Section 10, para. 1, of the United States Constitution.

L. Respondents have applied policies to Petitioner which impair the obligations of contracts Petitioner has with Respondents in violation of Article I, Section 13, of the Missouri Constitution (1945) and Article I, Section 10, para. 1, of the United States Constitution.

M. Respondents have denied Petitioner equal protection under the law in violation of Article I, Section 2, Constitution of Missouri (1945) and the Fourteenth Amendment to the United States Constitution by failing to apply equally the inflation factor of 111.1% to all allowable costs of Petitioner effective to December 31, 1988.

8. The amount in dispute is in excess of $500.00.

WHEREFORE, Petitioner prays the Administrative Hearing Commission for its decision, ruling, finding and order that the decision of Respondents was in error as aforesaid and ordering Respondents to set the Medicaid per diem reimbursement rate for Petitioner effective July 1, 1990, at the rate the Commission determines to be proper, plus interest and any applicable trend factors.

EXHIBITS OMITTED

Respectfully submitted,

HUSCH, EPPENBERGER,
DONOHUE, CORNFELD & JENKINS

/s/ Harvey M. Tettlebaum
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ATTORNEY FOR PETITIONER.